91-1531

No. _____

Supreme Court, U.S.
FILED
APR 27 1992
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In The

Supreme Court Of The United States

October Term, 1991

CHARLES BURKE,

Petitioner,

v.

STATE OF CONNECTICUT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented in this case are screaming for the attention of this court because the lower courts have been ignoring the U. S. Constitution and Bill of Rights as if they did not exist.

1. Did the state court have constitutional jurisdiction?

2. Did the Courts err in deciding that force is permissible in executing administrative search warrants?

3. Did the U. S. District Court err in failing to address all of the Constitutional issues raised?

4. Did the U. S. District Court err in failing to respond to all of the Constitutional issues raised?

5. Can a judge or other official lawfully ignore or violate the United States Constitution?

6. Is Connecticut General Statute 29-305 constitutional?

7. Were the administrative search warrants issued on the alleged authority of Connecticut General Statute 29-305 constitutional?

8. Can evidence gathered from an unconstitutional search warrant be used in a criminal prosecution?

9. Did the state court err in quashing subpoenas?

10. Should the issues before the state court have been dismissed as moot?

11. Is there any authority in the constitution for a prosecutor to voir dire prospective jurors or use peremptory challenges?

12. Can the accused be forced to use his peremptory challenges when prospective jurors should be dismissed

for cause?

13. Were the jurors qualified, fair and impartial?

14. Was the judge qualified, fair and impartial?

15. Did the court err in requiring the accused to use an affirmative defense on the sprinkler issue?

16. Has the state court enforced unconstitutional laws which violate the 14th. Amendment to the United States Constitution?

17. Did the state court err in ruling that the accused did not make a good faith attempt to correct alleged violations in a reasonable amount of time?

18. Did the state court err in not honoring the right of the accused to a new trial on newly discovered evidence?

19. Assuming that the sentence and fines were lawful, were they excessive to the extent that it constituted cruel and unusual punishment?

LIST OF PARTIES

Appellant:

Charles Burke, pro se

Appellee:

State of Connecticut, represented by,

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TOPICAL INDEX

Page

Questions Presented..... i

List of Parties..... v

Table of Authorities Cited..... vii

Jurisdiction..... 1

Statement of the Case..... 2

Argument on the Questions..... 9

Conclusion..... 32

Appendix

Notice of Appeal..... App. 1

Ruling of Petition for Writ of Habeas Corpus..... App. 2

Denial of Motion for Reconsideration..... App. 21

TABLE OF AUTHORITIES CITED

Constitutional Provisions

Page

U. S. Constitution, Art. I, Sec. 1... 17

U. S. Constitution, Art. II, Sec. 1.. 17

U. S. Constitution, Art. III, Sec. 1. 17

U. S. Constitution, Art. III, Sec. 2. 1.9

U. S. Constitution, Art. VI, Sec. 2.. 12

U. S. Constitution, Art. VI, Sec. 3.12,22

Amendments to the Constitution of the United States

Article IV..... 12,14

Article V..... 14,28

Article VI..... 10,18,20

Article XIV..... 28,29

Conn. Constitution, Art. I, Sec. 6.. 24

Conn. Constitution, Art. I, Sec. 7..13,15

Conn. Constitution, Art. I, Sec. 8..15,18

Conn. Constitution, Art. I, Sec. 9.. 15

Conn. Constitution, Art. XI,..... 22

STATUTES

Page

Title 28, U. S. C., Rule 10..... 1

Title 28, U. S. C., Sec. 2254..... 7

Conn. General Statute 54-193(b)..... 10

Conn. General Statute 29-305.. 2,12,13,14

Conn. General Statute 29-311..... 14

Conn. General Statute 542-2a..... 14

Conn. Genreal Statute 54-33a..... 14

Conn. General Statute 54-33f..... 14

Conn. General Statute 54-33j..... 14

Appellant CHARLES BURKE claims that a Writ of Certiorari must issue to review the denial of a Motion For Reconsideration by the United States Court of Appeals for the Second Circuit entered in this proceeding on February 18, 1992.

JURISDICTION

This court has jurisdiction under Art. III, Sec. 2 of the United States Constitution, and Title 28, U. S. Code, Sec. 1254.

Under Rule 10 of Title 28 of the United States Code:

> When a United States Court of Appeals ... has so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's power of supervision."

STATEMENT OF THE CASE

This case originated on December 16, 1987 when the fire marshals for the Town of East Hartford, Connecticut, Albert Fournier and Richard Metcalf obtained an unconstitutional administrative search warrant pursuant to (unlawful) Connecticut General Statute 29-305. The marshals then forcibly entered property of the Accused located at 217, 219 Burnside Avenue and 26 Sisson Street, East Hartford damaging the Accused's property and leaving it open, unprotected and exposed to the elements.

The fire marshal allegedly found a total of 16 violations.

On or about January 29, 1988, the fire marshals required that the Accused meet them at the properties (the Accused

did so under duress) to search it to see if the alleged violations had been corrected. Again they had unlawful administrative search warrants.

On April 28, 1988, the Accused was unlawfully ordered to appear in Housing Court before Judge Doyle.

The Accused challenged the jurisdiction of the court and claimed all of his constitutional rights under law in a court of law, as opposed to equity. (See transcript of April 28, pgs. 1 & 2). The court stated that the Accused would not be deprived of any of his rights. (See transcript of April 28, pg. 2). The court also stated that the Accused had a right to a public and speedy trial. (See transcript of April 28, pg. 5). The court then proceeded to deny every claim made by the Accused.

(See transcript of April 28, pgs. 6, 7, 19, 20 & 21).

On June 14, 1988, the Accused again appeared before Judge Doyle and the court denied the Accused's Claim To Dismissal because of illegal search (see transcript of June 14, pgs. 21 & 22). Again, the court stated that the Accused had a right to a public and speedy trial, yet never set it down for a trial in a court of constitutional jurisdiction. (See transcript of June 14, pg. 23). Nearly eighteen (18) months later the Accused was forced to trial, before Judge Terence Sullivan in GA 12 Court, Manchester. This was clearly not a speedy trial.

In the meantime, the Accused's main defense witness (who had installed the fire alarm systems in all three houses in this case), Tom Foran, had died and his

son, Patrick Foran, had moved away. (See deposition of Patrick Foran, pgs. 3 thru 11 and Exhibit 1), in effect denying the Accused a fair trial.

Before trial, Accused filed numerous claims all of which were unlawfully denied. The Accused had subpoenas served upon Judge Allen Smith, Judge Doyle, Deputy State's Attorny Vicki O'Donnell, Mayor Robert McNulty, Barry Zister, Albert Fournier and Richard Metcalf. All of them were unlawfully quashed except the subpoenas to Richard Metcalf and Albert Fournier. Albert Fournier failed to appear for the Accused (see transcript of Oct. 18, pgs. 18, 63, 68 & 75 & 77). The Accused therefore was not able to question Mr. Fournier and called for a mistrial, which was denied.

Albert Fournier and Richard Metcalf,

who testified as witnesses for the prosecution, repeatedly made contradictory and perjurious statements as can be seen on pages 4 through 12 of the Appeal Brief submitted to the Appellate Court of Connecticut.

The trial judge and the prosecutor admitted on the record that the state's chief witnesses lacked credibility. (See transcript of Oct. 17, pgs. 220 & 221 and Oct 18, pg. 36).

In 1985, the Accused not only had a standing order to install alarms in all his properties but kept sending messages to Tom Foran to get all of the systems on line. (See Deposition of Gregory Foran, pgs. 3, 4, and 5).

All fire alarm systems were installed within one hundred and twenty days after the citations were issued. (See Exhibit 1

and Deposition of Pat Foran, pg. 8).

The Accused was subsequently "convicted" on five of the nine counts and the trial court sentenced him to a total of 330 days and $2500.00 in fines (See transcript of Oct. 19, pg. 17). This "sentence" was even more severe than that recommended by the prosecutor (See transcript of Oct. 19, pg. 13).

Appellant exhausted his remedies at law on the state level when he was denied certification to appeal on April 11, 1991 by the Supreme Court State of Conn.

Appellant then filed a petition under 28 USC, Sec. 2254 for Writ of Habeas Corpus.

This was denied by U.S. District Court Judge Ellen B. Burns on the 18th day of July 1991 and filed the next day.

Appellant filed a notice of Appeal

on 12th day of June, 1991.

The appeal was dismissed without prejudice to the appeal being reinstated upon notice to the clerk within 30 days from the entry or an order by the district judge granting or denying a certificate of probable cause. This mandate was filed June 21, 1991.

Appellant filed a Claim For Certificate of Probable Cause on June 25, 1991 which was denied by Judge Burns on 12th day of July 1991.

Appellant's Appeal From Decision on Writ Of Habeas Corpus to the U. S. Court of Appeals for the Second Circut was denied and dismissed without explanation on Jan. 29, 1992.

A Claim For Articulation and Reconsideration was filed and denied on 18th day of Feb. 1992.

ARGUMENT ON THE QUESTIONS

Argument 1. Did the state court have constitutional jurisdiction?

The state court erred in deciding that it had constitutional jurisdiction when there was no victim (corpus delicti) and Article III Section 2 of the United States Constitution clearly mandates that "in all cases ... in which a state shall be a party the supreme Court shall have original jurisdiction."

The State of Connecticut (Plaintiff) is clearly a party to this case. A state paid judge cannot be fair and impartial because he is (as is the prosecutor) not only on the payroll of the state (Plaintiff) but also a member of the bar.

The Accused/Appellant also challenges jurisdiction, on the grounds that the

statute of limitations had expired under the provisions of Connecticut General Statute 54-193(b). Limitation of Prosecution For Various Offenses.

"No person may be prosecuted for any ... offense ... except within one year next after the offense has been committed."

Amendment Article VI to the Constitution of the United States, mandates that "In all criminal prosecutions, the Accused shall enjoy the right to a speedy trial." Speedy is a matter of hours and days, not weeks and months.

Argument 2. Did the Courts err in deciding that force is permissible in executing administrative search warrants?

Even the courts themselves have declared that the use of force is not permissible in executing administrative

search warrants.

Argument 3. Did the U. S. District Court err in failing to address all of the Constitutional issues raised?

It was/is the duty of the U. S. District Court to address all of the Constitutional issues raised.

Argument 4. Did the U. S. District Court err in failing to respond to all of the Constitutional issues raised?

It was/is the duty of the U. S. District Court to respond to all of the Constitutional issues raised, and to give Constitutional reasons for any denial of Constitutional claims.

Argument 5. Can a judge or other official lawfully ignore or violate the United States Constitution?

No judge or other official can ignore or violate the United States Constitution

and its mandates, especially Article VI Section 2 which states: "This constitution ... shall be the supreme Law ... and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding."

Article VI Section 3 mandates that "All executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution."

Argument 6. Is Connecticut General Statute 29-305 constitutional?

The courts erred in deciding that the completely out of harmony right to enter clause of Connecticut General Statute 29-305 was constitutional. Amendment Article IV of the United States Constitu-

tion clearly mandates that "the right of the people to be secure in their ... houses against unreasonable searches ... shall not be violated."

Connecticut Constitution Article First Section 7 guarantees that "the people shall be secure in their houses ... and possessions from unreasonable searches."

A "right" to enter through locked doors which are posted "no trespassing, keep out" is surely unreasonable.

Connecticut General Statute 29-305 does not even mention the word "warrant" much less oath, affirmation or probable cause, therefore, it lawlessly compels the Accused to be a witness against himself under its right to enter clause.

Connecticut General Statute 29-305 is also in conflict with the following

Connecticut General Statutes:

a. 29-311, b. 54-2a, c. 54-33a, d. 54-33f and e. 54-33j. These all require a warrant based on probable cause and supported by oath or affirmation.

Argument 7. Were the administrative search warrants issued on the alleged authority of Connecticut General Statute 29-305 constitutional?

The fire marshal's office used administrative search warrants that were issued without oath, affirmation or probable cause in clear violation of both the United States Constitution, Amendment Article IV which states clearly that no warrant (emphasis added) shall issue, but upon probable cause, supported by oath or affirmation ..." and Amendment Article V "No person shall be ... compelled in any criminal case to be a witness against

himself," and the Connecticut Constitution Article First Section 7, "the people shall be secure ... from unreasonable searches ... and no warrant to search any place ... shall issue ... without probable cause supported by oath or affirmation."

Section 8 mandates "... no person shall be compelled to give evidence against himself ..."

Section 9 states "no person shall be arrested, detained or punished, except in cases clearly warranted by law."

It should be clear that the warrants and searches were unconstitutional and the Accused was punished simply for asserting his rights. The warrants failed to show jurisdiction on their face, they were vague, insufficient, uncertain and there was no affidavit,

sworn statement, alleged facts or probable cause indicating that the Accused had broken any valid laws.

Under current policies any evidence gathered should have been suppressed for lack of lawful due process.

Force was used to gain entrance to these properties, when force was not needed. They were left open, unprotected and exposed to the elements.

An indication that the searches were conducted with malice is the fact that the Accused had sued the fire marshal's office for not obtaining warrants pursuant to the Constitution.

Argument 8. Can evidence gathered from an unconstitutional search warrant be used in a criminal prosecution?

The Accused contends that the unconstitutional exercise of power

constitutes criminal acts by administrative public servants and has the effect of bringing the legislative, executive and judicial branches of government into close harmony with one another but out of harmony with the Constitution. Such criminal acts violate the separation of powers doctrine which is the very basis of the Constitution of the United States:

Article 1, Section 1: "All the Legislative power herein granted shall be vested in congress ...".

Article 2, Section 1: "the executive power shall be vested in the President ...".

Article 3, Section 1: "The judicial power shall be vested in one supreme court ...".

Logically, and assuming that he did do some harm, the Accused cannot be

punished until those who violated his rights are punished.

Argument 9. Did the state court err in quashing subpoenas?

Amendment VI of the United States Constitution mandates "In all criminal prosecutions, the Accused shall enjoy the right to have compulsory process for obtaining witnesses in his favor ..."

Article First Section 8 of the Constitution of the State of Connecticut states "In all criminal prosecutions, the Accused shall have a right to be heard ... to be confronted by the witness against him; to have compulsory process to obtain witnesses in his behalf."

There is no authority in the constitution for a judge to "quash" subpoenas. Lacking such authority, he is barred from doing so.

Until trial, Everyone involved in this case was acting in an administrative capacity, even Judge Allen Smith who signed the first administrative search warrant on December 15, 1987. If the Accused had been allowed to question Judge Smith, he could have established the fact that Judge Smith violated his contract with We the People by signing the (unlawful) administrative search warrant without which this case could have never started.

This fact, if explained to the jury would logically have caused the jury to reach a verdict of not guilty.

Six defense witnesses failed to appear as subpoenaed, with no corrective action by the court.

Argument 10. Should the issues before the state court have been

dismissed as moot?

Even if the court had lawful jurisdiction, this case became moot when the issues presented were no longer "live" or the parties lacked a legally cognizable interest in the outcome. The state had knowledge that all alleged violations were corrected shortly after January 29, 1988 and therefore were corrected in a reasonable amount of time since the fire marshal stated that they allowed up to one hundred twenty days and possibly even one year.

Argument 11. Is there any authority in the constitution for a prosecutor to voir dire prospective jurors or use peremptory challenges?

Amendment Article VI to the United States Constitution states "In all criminal prosecutions, the Accused shall

enjoy the right to a speedy and public trial by an impartial jury." (emphasis added)

This guarantees the right of the Accused to question the jury panelists to attempt to assure that they will be fair and impartial. It does not limit the peremptory challenges of the Accused. The supreme law prohibits the state from tampering with the panelists in voir dire. Experience has shown that the prosecution uses voir dire to select jurors who will be less than fair and impartial to the defendant.

Argument 12. Can the accused be forced to use his peremptory challenges when prospective jurors should be dismissed for cause?

It is an abuse of judicial authority to force a defendant to use a peremptory

challenge to excuse a jury panelist who has demonstrated an inability to be fair and impartial.

Argument 13. Were the jurors qualified, fair and impartial?

The jury panelists were not drawn from a cross section of the community.

They did not take the required oath to uphold the constitution of the United States and the State of Connecticut. As jurors they became officers of the court subject to Article VI, Section 3 of the United States Constitution which states " ... Judicial officers ... shall be bound by oath or affirmation, to support this constitution."

This is backed up by Article Eleventh of the Constitution of Connecticut which requires that jurors take an oath to "support the constitution of the United

States and the constitution of the State of Connecticut."

Many of the jury panelists were in a conflict of interest position, in that they had sworn an oath of loyalty to the Accuser, the State of Connecticut.

Most, if not all, of the jurors were not peers of the Accused, in that they admitted to a lack of knowledge of many of the constitutional principles, protections and guarantees which are second nature to the Accused, and which his peers would be expected to possess also.

The Accused was not accorded an opportunity to observe the jury indoctrination process and to offer a rebuttal of the many erroneous instructions to which the jury panelists were subjected (brainwashed).

The jury panelists were not given a

copy of the Constitution, the law under which the court is required to operate and which contains the foundation of the defense of the Accused.

Argument 14. Was the judge qualified, fair and impartial?

The "judge" was, and is, on the payroll of the Accuser.

The "judge" remained in an equity posture, when informed by the Accused that the Accused was claiming his right to be at law/as opposed to equity.

The "judge" refused to honor the right of the jury panelists to ask questions of the participants and the witnesses.

The "judge" refused to read Article First, Section 6 of the Constitution of Connecticut to the jurors, thereby depriving them of their right to know

that they had a right to judge the law as well as the facts.

The "judge" allowed the prosecutor to take part in the voir dire process, though there is no Constitutional authority for his doing so.

The "judge" allowed the prosecutor to object to many of the questions asked by the Accused; questions which were vital to his defense, and which could not lawfully be suppressed.

The "judge" frustrated and threatened the Accused in his attempts to use constitutional tactics, in a case in which the defense of the Accused was almost entirely constitutional.

The "judge" denied the right of the Accused to:

a. Claim A Dismissal for Lack of Jurisdiction.

b. Claim A Dismissal for Illegal Search.

c. Claim A Dismissal for Violation of the Doctrine of Separation of Powers.

d. Claim A Dismissal for Violation of the Accused's Constitutional Rights.

e. Claim A Dismissal for Conflict of Interest.

f. Claim A Fair Hearing.

g. Claim Suppression of the Evidence.

h. Claim Jury Nullification.

i. Claim Dismissal of Prosecution as Moot.

j. Claim A Mandamus to Bar Unlawful Prosecution.

k. Claim A Charge to the Jury.

l. Claim A Speedy Trial Dismissal.

m. Claim A Conclusion of Law.

n. A Second Claim For Judgment of

Acquittal Notwithstanding the Verdict, Error Of Law And Fact.

o. Claim An Arrest Of Judgment.

p. Claim An Extension Of Time.

q. Claim A New Trial.

r. Claim A Judgment Of Acquittal As To All Offenses Specified In The Verdict.

s. Claim To Set Aside Judgment On New Found Evidence.

t. Claim A Reconsideration Of Second Claim For Acquittal Notwithstanding The Verdict.

He thereby knowingly denied justice to the Accused.

Argument 15. Did the court err in requiring the accused to use an affirmative defense on the sprinkler issue?

The Accused had no obligation to defend and cannot be deprived of his

right to be protected by what the judge characterized as an affirmative defense.

The fifth and fourteenth Amendments of the United States Constitution provide:

Amendment Article V. of the United States constitution states "... nor be deprived of life, liberty or property without due process of law ..."

Amendment Article XIV Section 1 of the United States Constitution states "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process ... nor deny to any person within its jurisdiction the equal protection of the laws."

The court and jury presumed facts not

in evidence. The information did not charge that there was no sprinkler system. There was no evidence or testimony overcoming the exceptions of a sprinkler system. This, by itself, should have been cause for an acquittal.

The court knew, and acknowledged, that the state had failed to meet its burden to prove that there was no sprinkler system.

The judge failed to read the Accused's Claim For Charge To The Jury. Even so, if the jury had followed the court's instructions) the jury would have acquitted the Accused.

Argument 16. Has the state court enforced unconstitutional laws which violate the 14th Amendment to the United States Constitution?

The courts have unlawfully enforced

Conn. Gen. Statutes that are in clear conflict with both the United States Constitution and the Constitution of the State of Connecticut.

Argument 17. Did the state court err in ruling that the accused did not make a good faith attempt to correct alleged violations in a reasonable amount of time?

Though not required to do so by valid law, the Accused had corrected all alleged violations within the time period testified to as reasonable by the state's chief witnesses.

Argument 18. Did the state court err in not honoring the right of the accused to a new trial on newly discovered evidence?

The Accused timely presented new evidence which was unavailable to the

Accused at the time of trial and which could be expected to cause the jury to render a different verdict.

Argument 19. Assuming that the sentence and fines were lawful, were they excessive to the extent that it constituted cruel and unusual punishment?

The record shows that for similar (alleged) violations other Defendants have received little or no incarceration and light fines if any. Obviously, this Accused was given a severe punishment for standing up for his rights and attempting to require the court (and other public servants) to abide by the mandates of the constitutions, which they have taken an oath to uphold.

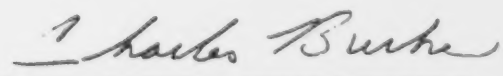
CONCLUSION

The Accused/Appellant has been harmed by a comedy of errors and violations of Constitutional laws committed by government officials and the courts.

The chief witnesses of the state should have been impeached and the Accused should have been acquitted or the case dismissed.

The Accused is entitled to, and expects from this court, a reversal of the conviction or an order for a new trial.

Accused/Appellant



Charles Burke
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No. _____

In The

Supreme Court Of The United States

October Term, 1991

CHARLES BURKE,

Claimant,

v.

STATE OF CONNECTICUT,

Respondent.

APPENDIX

App.1

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CHARLES BURKE	DOCKET NO. 2:91CV00394 EBB
V.	AT NEW HAVEN
STATE OF CONNECTICUT	JUNE 12, 1991

NOTICE OF APPEAL

Said Charles Burke hereby gives notice that same appeals the denial of the stay of execution by Judge Burns to the U. S. Court of Appeals for the Second Circuit.

/s/
Charles Burke
99 Tolland St.
East Htfd, CT 06108

CERTIFICATION

I hereby certify that a copy of the foregoing was mailed on June 12, 1991, to:

1- Stephen O'Niell, 110 Sherman St. Htfd, CT 06105
2- Theodore Kamasinski, 87 Old Rockingham Rd., Salem, N. H. 03079

United States District Court

District of Connecticut

Charles Burke, Pro Se:

v. : Civil No. 2:91CV00394(EBB)

State of Connecticut :

RULING
OF PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, Charles Burke, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons stated below, the petition is denied.

Background

Petitioner owns and operates three rooming houses in East Hartford Connecticut. Connecticut General Statute § 29-305 requires the local fire marshal to inspect, inter alia, all occupancies regulated by the fire safety code at

least once a year 1. The inspection is to ensure that all applicable fire safety

---

1. Conn. Gen. Stat. § 29-305 states in pertinent part: "Each local fire marshal and the state fire marshal, for the purpose of satisfying themselves that all pertinent statutes and regulations are complied with, may inspect in the interests of public safety all buildings and facilities of public service, all buildings and facilities used for manufacturing and all occupancies regulated by the fire safety code within their respective jurisdictions. Each local fire marshal shall inspect or cause to be inspected, at least once each calendar year and as often as may be necessary in the interests of public safety, all buildings and facilities of public service and all occupancies regulated by the fire safety code within his jurisdiction..."

---

regulations are being adhered to. In October, 1987, the fire marshal contacted Petitioner by letter to arrange for an annual inspection of his rooming houses, whereupon Appellant, by return letter, advised the town of East Hartford that he

would refuse warrantless entry onto his property by town officials. The fire marshal thereupon obtained an administrative search warrant and, unable to locate Appellant, forcibly entered the Appellant's three rooming houses. These inspections uncovered a number of violations which Petitioner was advised, by letter, to correct within eleven days or face prosecution. Approximately six weeks later on January 29, 1988, the fire marshal again obtained an administrative search warrant and forcibly entered Appellant's three rooming houses to determine if the violations had been corrected. Upon finding that certain of the violations were not corrected, the fire marshal advised the state, which filed an information against the Petitioner on April 7, 1988. The trial

began on October 3, 1989.

On October 19, 1989, Petitioner was found guilty in the Superior Court, Judicial District of Hartford - New Britain, of two counts of failure to provide a fire alarm system in a rooming house in violation of the Connecticut fire safety code § 20-3.3.1, two counts of failure to provide self-closing or automatic-closing doors to sleeping rooms in a rooming house in violation of § 20-3.4, and one count of failure to maintain an operational smoke detection system, in violation of § 20-3.3.4. The court sentenced the Petitioner to a total of 330 days imprisonment and $2,500.00 in fines.

Petitioner appealed to the Connecticut Appellate Court, which affirmed his conviction, State v. Burke,

23 Conn.App.528 (1990) cert. denied, 218 Conn. 906 (1991). On May 7, 1991, Petitioner filed a petition for a writ of habeas corpus with this court, alleging that his conviction violated his rights to a speedy trial, compulsory process and due process of law under the Sixth and Fourteenth Amendments to the Constitution. Pursuant to an order issued by this court, the State was required to file an answer to the petition on or before June 14, 1991 and to show cause as to why the petition should not be granted. A hearing on the petition was held on June 25, 1991.

Discussion 2

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2 Petitioner is entitled to raise and this court is empowered to consider only claims of constitutional defects in his conviction, Moore v. Dempsey, 261 U.S. 86,87 (1923) ("What we have to deal with is not the Appellants' innocence or guilt but solely the question of whether

their Constitutional rights have been preserved"). At oral argument, the state asserted that Petitioner had not properly raised a number of his constitutional claims at the state level. A review of the record, however, indicates that those claims were adequately briefed and argued to the trial and appellate courts, and were thus properly raised here.

I. Speedy Trial Claim

Petitioner alleges that the seventeen-month delay between the date of the violations and the commencement of his trial amounted to a denial of his right to a speedy trial under the Sixth Amendment (:... In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...U.S. Const. Amend. VI.). Sixth Amendment review of speedy trial claims should include discussion of "[l]ength of delay, the reason for the delay, defendant's assertion of right, and prejudice to the defendant". Barker v. Wingo, 407 U.S.

514, 530 (1971). The state's seventeen-month delay in bringing this simple case to trial triggers this court's scrutiny ("The length of delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." Id.).

The delay in this case was attributable, in part, to congestion in the state court. While no bad faith can be attributed to the state, it remains the state's responsibility to bring the defendant to trial in a timely fashion. Id. A seventeen-month delay caused by court congestion, however, is not, in itself, sufficient to constitute a Sixth Amendment violation. As the Second Circuit recently noted in reviewing a

similar delay in the commencement of a trial;

> the seventeen-month delay here, while lengthy, is nevertheless considerably shorter than in those other cases where we have found no speedy trial violations. United States v. McGrath, 622 F.2d 36 (2d Cir. 1980) (twenty-four months); United States v. Lane, 561 F.2d (2d Cir. 1977) (fifty-eight months); United States v. Mejias, 552 F.2d 435 (2d Cir. 1977), cert denied, 434 U.S. 847 (1977) twenty-one months)...

Flowers v. Connecticut Correctional Institution, 853 F.2d 131 (2nd Cir. 1988), cert denied, 488 U.S.995 (1988), reh'g denied, 488 U.S.1051 (1989)

Moreover, in the instant case, the Petitioner bears a good part of the blame for the pre-trial delay. Under Conn. Gen. Stat. § 54-82m, the defendant had the right to move for a speedy trial after twelve months had passed from the date of his plea 3. If the trial did not commence within thirty days of his motion, the statute required the

information to be dismissed. In the months prior to his trial, the Petitioner filed a large number of motions before the court, only one, on the eve of his trial, requesting a speedy trial 4. If, as he now contends, the Petitioner felt prejudiced by the delay, he bore some responsibility for making his objections known to the trial court, in a timely manner.

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3. Conn. Gen Stat. § -82m reads in relevant part,

"...(1) in any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of a criminal offense shall commence within twelve months from the filing date of the information or indictment or from the date of the arrest, whichever is later... (2) if a defendant is not brought to trial within the time limit set forth in subdivision (1) and a trial is not commenced within thirty days of a motion for a speedy trial made by the defendant at any time after such time limit has passed, the information or indictment shall be dismissed..."

4. Petitioner moved for a dismissal based on denial of speedy trial on September 11, 1989. Even if this is to be regarded as a motion for speedy trial under Conn. Gen. Stat § 54-82m, the trial commenced less than one-month from that date.

Finally, the Petitioner has failed to make a convincing showing of prejudice to his defense. The information, filed less than three months after the alleged safety code violations, gave the Petitioner notice of the charges and an opportunity to prepare his defenses. While appearing Pro Se, the Petitioner was evidently familiar with legal procedure and immediately began preparing his defense, as indicated by his appearances in court. He contends, however, that he was prejudiced by the death of a key witness, a Mr. Foran 5, who he alleges was the owner of a construction company to which he had given a standing order to install

fire alarms on his property some two years before the violation. The court notes that two of Foran's sons testified in depositions following the trial that the alarm systems for the three boarding houses were on order for over two years and were installed in March, 1988, after the violations were recorded. The Petitioner has failed to explain why he did not make any demonstrable effort to contact these individuals prior to his conviction. If anything, the seventeen-month period between the filing of the information and going to trial, should have provided Petitioner with sufficient time to develop and present this and other defenses. In view of Appellant's failure to assert his speedy trial rights in a timely fashion and failure to prove that he was prejudiced by the resulting

delay in the commencement of his trial, this court finds no Sixth Amendment deprivation to the Appellant.

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5. The trial record does not indicate and Petitioner has not advised the court of the date and circumstances of Foran's death or his first name.

Denial of Compulsory Process

Prior to his trial, Petitioner subpoenaed a large number of judicial, municipal and elected officials. Petitioner contends that he intended to question these officials regarding the constitutional basis for their actions in requesting, issuing and executing the warrant to search his property and search warrants in general. Petitioner claims that the trial court's quashing of these subpoenas violated his Sixth Amendment right to compulsory process ["In all

criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor...: U.S. Const. amend. VI].

> The Sixth Amendment by its terms, gives the defendant in a criminal trial the right "to have compulsory process for obtaining witnesses in his favor". This does not however, guarantee him an unrestricted right to compel the presence of any and all witnesses he may choose. Rather, the defendant who complains that his right to call witnesses has been violated "must at least make some plausible showing of how their testimony would have been both material and favorable to his defense".

U.S. v.Scopo, 861 F2d. 339, 345 (2d Cir. 1988) (quoting United States v. Valenzuela - Bernal, 458 U.S. 858, 867 (1982)) cert. denied 490 U.S. 1048 (1989).

For the past twenty-five years, the Supreme Court has recognized that "the only effective way to seek universal compliance with the minimum standards required by municipal codes is through

routine periodic inspections of all structures." Camara v. Municipal Court, 387 U.S. 523, 535 (1967). In Camara, and its companion case, See v. City of Seattle, 387 U.S. 541 (1967), the Supreme Court indicated that safety inspections of private and commercial buildings could be conducted only with permission of the owner or with a search warrant. Given the limited scope and purpose of these inspections and the strong public interest at stake, however, the Camara Court formulated relaxed probable cause standards to issue search warrants for municipal safety inspections, stating that:

> it is obvious that probable cause to issue a warrant must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. Such standards, which will vary with the municipal program being enforced, may be based

> upon the passage of time, the nature of the building, eg. a multifamily apartment house, or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling.

Camara, 387 U.S. at 538.

In the instant case, the East Hartford fire marshal was required by state statute to inspect certain buildings, including those of Appellant, in his jurisdiction at least once a year, see C.G.S. § 29-305, but the Petitioner had refused the fire marshal entry onto his property. This statutory mandate to inspect all such buildings, coupled with the Appellant's specific denial of warrantless entry onto his properties, is on its face sufficient to meet the probable cause standards articulated in Camara. Accordingly, the trial court acted properly in quashing these

subpoenas as the requested testimony would have been irrelevant to the Appellant's defense. As such, no Sixth Amendment violation occurred.

Sentencing

Appellant's final constitutional claim asserted in his habeas petition is that, in sentencing him, the trial court violated his Fourteenth Amendment due process rights by sentencing him to an excessive term in retaliation for asserting his right to defend himself.

The jury found Petitioner guilty of a total of five counts of violations of the fire safety code. The maximum sentence for each count was six months imprisonment and a $1,000 fine. Although the state recommended a 30 day actual sentence for each of three counts and a $400 fine for each of the two remaining

counts, the trial judge, noting the public safety implications of fire safety regulations and the absence of mitigating factors, imposed a total sentence of 330 days and a fine of $2,500.

"[A] sentencing judge has very broad discretion in imposing any sentence within the statutory limits and in exercising that discretion he may and should consider matters that would not be admissible at a trial." United States v. Sweig, 454 F.2d 181, 183 (2d. Cir. 1972) (cited cases omitted). Here, the petitioner could have received a maximum sentence of two and one-half years in prison. In light of Appellant's willful failure to comply with minimal fire safety requirements, it was clearly within the trial judge's discretion to set his sentence at slightly over

one-third of that maximum.

Moreover, the court finds no merit in the Appellant's contention that he was being excessively punished for refusing to submit to a plea bargain with the state. As the Second Circuit has noted "We reject ... [the] ... contention that the availability of a sentence reduction to one who clearly admits personal responsibility for the offense is the equivalent of an increase in sentence for one who does not." C4. United States v. Parker, 903 F.2d 91, 105 (2d Cir. 1990) (finding constitutional a reduction of sentence for convicted defendant who admits guilt). Finally, the trial transcripts do not provide any evidence whatsoever to support Appellant's charges that the court was biased or that the Petitioner was singled out for

unusually harsh treatment. As such, the court finds no violation of the Fourteenth Amendment to have been sustained by the Appellant.

Conclusion

For the foregoing reasons, the petition for habeas corpus is denied.

So ordered.

/s/

Ellen Bree Burns, Chief Judge
Connecticut District Court

Entered at New Haven, Connecticut this 18th day of July, 1991.

UNITED STATES COURT OF APPEALS
Second Circuit
United States Courthouse
Foley Square
New York 10007

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the eighteenth day of February, one thousand nine hundred and ninety-two.

Charles Burke,
Plaintiff-Appellant

v. Docket No. 91-2289

State of Connecticut,
Defendant-Appellee.

A motion having been made herein by pro se appellant Charles Burke for RECONSIDERATION.

Upon consideration by the panel that decided the appeal, it is Ordered that said motion be and it hereby is DENIED.

/s/
Elaine B. Goldsmith, Clerk